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Supreme Court, U.S.
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No. 97-553

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DECHARLEUNO J. HALL,
Petitioner,

v.

ATLANTA PUBLIC SCHOOL SYSTEM,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

AMY TOTENBERG, ESQ.
Counsel of Record
210 Pryor Street
Atlanta, Georgia 30335
(404)827-8959

CHARLES L. WEATHERLY, ESQ.
THE WEATHERLY LAW FIRM
3414 Peachtree Road, NE
Suite 450
Atlanta, Georgia 30326
(404)262-9500

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STATEMENT OF THE CASE

Nature of the Case

Notwithstanding the position of Petitioner, this is a very simple case and is not one for which a writ should be issued. This is a case that should have been brought under the Individuals with Disabilities Education Act ("IDEA") but was brought under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the Americans with Disabilities Act ("ADA") and 42 U.S.C. § 1983 ("Section 1983"). As a result, the Eleventh Circuit upheld the District Court's dismissal of Petitioner's Complaint because he did not properly exhaust administrative remedies pursuant to IDEA prior to bringing his action.

Statement of Facts

For obvious reasons, Respondent has not taken the opportunity to assert its denials or defenses in this case, as it moved to dismiss the action based upon a clear principle of law. In response, Petitioner has continued to assert facts that were not properly sworn or pled in his Complaint. Specifically, Petitioner asserts that he was not notified of a "decision" that he could not run track at Southside and that neither he nor his mother were informed that they had the right to complain. In addition, Petitioner waited until briefing before this Court to argue that exhaustion of administrative remedies would be futile and even then offered no evidentiary support for this assertion.[1] (Petition, page 15).

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[1] The Eleventh Circuit noted that even had Petitioner argued that exhaustion would have been futile or inadequate, the argument would have been pointless since Petitioner made the decision to wait three years to formally complain and then left school while the School System reviewed the complaint. (Petition, App. B, a-5).

Petitioner has never disputed that his claims could have and should have been brought under IDEA and that the law clearly requires exhaustion of administrative remedies. Indeed, Petitioner pled in his original Complaint that he had "satisfied any and all conditions precedent to the filing of this action...." (R1-1-12, 13).

It is also important that Petitioner's Complaint clearly indicated that during the 1991-92, 1992-93 and 1993-94 school years, he "continually sought but was repeatedly refused the opportunity to become a member of the Southside track team." (R1-1-8). In light of this statement, Petitioner's assertion that he was not provided "notice" until February 1995 of being denied the opportunity to compete on the Southside track team is without merit. This is so, especially in light of the fact that Petitioner's mother formally complained to Respondent's Office of Equal Educational Opportunities ("OEEO") on June 30, 1994. (R1-9-4).

It is clear that Petitioner's mother knew that he was not running track and that she should complain in 1994. After she complained, Respondent's OEEO Coordinator, Ms. Reanee Ivey, wrote to Petitioner's mother in February 1995 that, based upon a medical examination and additional considerations, the risk of injury to Petitioner and to other students outweighed his desire to run track. In addition, the letter expressly informed Petitioner's mother that she had the right to appeal the decision and that she "should ask that a due process hearing be conducted in response to the decision made." (R1-9-5; Petition, App. I, a-27).

Instead of initiating a due process hearing, Petitioner employed legal counsel and filed a complaint with the Office for Civil Rights on June 19, 1995. (R1-9-6). In addition, he initiated an action in district court for money damages on December 20, 1995.

The Eleventh Circuit affirmed the district court's dismissal of Petitioner's case on the basis that he first attempted to join the track team in 1991 but did not complain about the denial of the opportunity to do so until June 30, 1994, after his junior year ended and only months before he chose not to return to Southside. Further, the Eleventh Circuit found that, although Petitioner contended that Respondent failed to provide him with a definitive answer to his requests to join the track team, this lack of notice had not precluded Petitioner's mother from lodging a complaint in June of 1994.

The Eleventh Circuit noted that in response to the June 1994 complaint, Respondent ordered an eye examination of Petitioner, reviewed Petitioner's medical records and refused his request to participate. In addition, the Eleventh Circuit found that Respondent's letter of February 7, 1995 gave adequate notice of the right to ask for a hearing pursuant to IDEA. Because the right was not exercised, the Eleventh Circuit concluded that Petitioner failed to exhaust IDEA's administrative remedies and that the district court properly placed the burden on Petitioner to justify the failure.

Contrary to Petitioner's arguments, the Eleventh Circuit's decision does not depart, in any way, from the provisions of IDEA, from the decisional law of another United States court of appeals or from its own precedent. Accordingly, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT DEPART FROM THE PROVISIONS OF IDEA, FROM THE DECISIONAL LAW OF OTHER COURTS OF APPEAL OR FROM ITS OWN PRECEDENT.

A. The Clear Language of IDEA and its Regulations Requires Exhaustion in this Case.

The Individuals with Disabilities Education Act provides public school agencies with federal assistance for the education of students with disabilities. To implement IDEA, the United States Department of Education has promulgated regulations that, in addition to requiring appropriate educational instruction to students with disabilities, contain provisions with respect to nonacademic and extracurricular activities. For example, the regulations require public agencies to "take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford children with disabilities an equal opportunity for participation...." 34 C.F.R. § 300.306(a).

In addition to its substantive provisions, IDEA contains an array of procedural safeguards that must be made available to students with disabilities and their parents.[2] Included among these safeguards is the opportunity for parents to "present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education...." 20 U.S.C. § 1415(b)(6). Whenever a complaint

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[2] Respondent notes that IDEA was significantly amended on June 4, 1997 and that Appendix H to the Petition contains the language of the former statute.

has been received, the parents "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency...." 20 U.S.C. § 1415(f)(1).

Any party aggrieved by the findings and a final decision made by a hearing officer "shall have the right to bring a civil action with respect to the complaint" in any State court of competent jurisdiction or in a district court. 20 U.S.C. § 1415(i)(2)(A). The court is required to receive the records of the administrative proceedings, hear additional evidence at the request of a party and "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B).

With regard to its effect upon actions brought under other statutes, IDEA provides that it is not to be construed to restrict or limit the rights, procedures and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 or other Federal laws protecting the rights of children with disabilities. 20 U.S.C. § 1415(l). However, the Act is clear that "before the filing of a civil action under such laws seeking relief that is also available under [IDEA]," the due process procedures under IDEA shall be exhausted to the same extent as would be required had the action been brought under IDEA.[3] *Id.*

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[3] Again, it is pertinent that Petitioner has never disputed that his case could have and should have been brought under IDEA and that the law clearly requires exhaustion of administrative remedies. Rather, it has always been his position that it is the fault of Respondent that he did not exhaust such remedies.

B. Respondent Provided and Petitioner Had Sufficient Notice of the Right to Initiate a Due Process Hearing.

Respondent does not dispute the importance of IDEA's procedural safeguards. However, the Eleventh Circuit correctly found that the opportunity for a due process hearing and sufficient notice of that right were given to Petitioner in February of 1995, such that exhaustion of administrative remedies would be required in this case.[4]

Even assuming *arguendo* that Respondent's February 1995 letter did not constitute adequate notice of the right to initiate a due process hearing, the necessity for Petitioner to exhaust would not be eliminated. At the very least, Petitioner should have been made aware of the exhaustion requirement when he hired legal counsel in June of 1995.

Under IDEA, the Eleventh Circuit has held that technical procedural violations, such as the failure to provide written notice, will serve as the basis for relief *only* where the procedural violation is shown to have harmed the student or parents. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651 (11th Cir. 1990). In *Doe,* the Eleventh Circuit held that, while there may have been deficiencies with regard to the provision of written notice to the parents, such deficiencies had no impact upon them or the student and, therefore, could not serve as a basis for relief to the parents. Other circuits have agreed. *See Chuhran v. Walled Lake Consolidated Schs.*, 51 F.3d 271 (6th Cir. 1995); *Weil v. Bd. of Elementary &*

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[4] To the extent that Petitioner argues that the notice of the right to a hearing did not specify the hearing as an "IDEA hearing," the Act does not require a school agency to designate the hearing as such. Thus, Petitioner's argument based upon the fact that Ms. Ivey's letter did not specify the right to an "IDEA hearing" is unpersuasive.

Secondary Educ., 931 F.2d 1069 (5th Cir.), *cert. denied*, 112 S. Ct. 306 (1991); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990); *Leonard v. McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989); and *Evans v. Sch. Dist. No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988).

At least by February of 1995, Petitioner's mother was made aware of the right to initiate a due process hearing. Additionally, Petitioner and his counsel have known since June 1995 that he had the right to and was required to initiate a due process hearing to address his claims. Thus, sufficient notice was provided to trigger the requirement for the exhaustion of administrative remedies in this case.

II. THE ELEVENTH CIRCUIT WAS CORRECT IN REFUSING TO RELIEVE PETITIONER OF HIS OBLIGATION TO EXHAUST ADMINISTRATIVE REMEDIES.

Petitioner argues that Respondent is to blame for his failure to exhaust and that, therefore, he should be excused for such failure. Obviously, Petitioner's argument is based upon the incorrect premise that sufficient opportunity was not provided to him for a due process hearing. However, even were Petitioner's premise correct, the Eleventh Circuit's decision requiring exhaustion would remain valid and does not depart from decisions of other courts of appeal.

In support of his position, Petitioner relies upon the Second Circuit's decision in *J.G. v. Rochester City Sch. Dist.*, 830 F.2d 444 (2d Cir. 1987). However, *J.G.* is not in conflict with the Eleventh Circuit's holding. Rather, the Second Circuit found that exhaustion was excused because the plaintiff's claim was that the school district *systematically* did not inform parents of the right to present complaints and to

initiate impartial hearings and how to obtain them. Such was not the case here.[5]

Petitioner's reliance upon two decisions from the Fifth Circuit is also misplaced. In relying upon the Texas district court opinion of *Ruth Anne M. v. Alvin Independent Sch. Dist.*, 532 F. Supp. 460 (S.D. Tex. 1982), Petitioner fails to discuss *all* of the court's language with regard to excusable failure to exhaust. Although the court found that plaintiffs were not notified of their administrative rights under the Act and that the school district had not taken notice-triggering action, the court observed that "[n]or have defendants established that plaintiffs otherwise knew or should have known of the availability of administrative recourse...." 532 F. Supp. at 463. The Eleventh Circuit found, in the instant case, that Petitioner knew or should have known of the availability of an administrative hearing.

Petitioner's reliance upon the Fifth Circuit's decision in *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623 (5th Cir. 1986) is also misplaced. Quite simply, the Fifth Circuit did not address the issue of exhaustion of administrative remedies for claims covered by IDEA in *Jackson*.

III. PETITIONER DID NOT ARGUE BELOW THAT EXHAUSTION WOULD HAVE BEEN FUTILE.

Petitioner has waited until now to assert that exhaustion would have been futile in this case. As was noted by the Eleventh Circuit, even had he made such an argument, it

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[5] The Second Circuit's opinion in *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2d Cir. 1983) is also immaterial to the Eleventh Circuit's opinion in this case. There, the court allowed an action for damages to proceed in the absence of exhaustion because the school district specifically denied a parental request for a due process hearing.

would have been "pointless," since Petitioner waited three years to formally complain and then left school. (Petition, App. B, a-5). For Petitioner to make this argument now is also "pointless," as this Court need not address an argument not properly raised below.[6] *See, e.g., Ryder v. United States,* 115 S. Ct. 2031 (1995); *Heller v. Doe,* 113 S. Ct. 2637 (1993); and *United States v. Williams,* 504 U.S. 36 (1992).

IV. THE ELEVENTH CIRCUIT DID NOT DEPART FROM ITS OWN PRECEDENT OR THAT OF OTHER COURTS OF APPEAL BY PLACING THE BURDEN OF PROVING AN EXCEPTION TO THE EXHAUSTION REQUIREMENT UPON PETITIONER.

It remains important that Petitioner never pled or provided sworn evidence in support of his request to be excused from the exhaustion requirement. The burden of proving an exception to the exhaustion requirement rests upon the party seeking to avoid the mandate. *See, e.g., Honig v. Doe,* 108 S. Ct. 592 (1992); *Doe v. Arizona Dept. of Education,* 111 F.3d 678 (9th Cir. 1997); *Gardner v. Sch. Bd. of Caddo Parish,* 958 F.2d 109 (5th Cir. 1992); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n,* 873 F.2d 933 (6th Cir. 1989); *Hall v. United States Postal Service,* 857 F.2d 1073 (6th Cir. 1988); *Riley v. Ambach,* 668 F.2d 635 (2d Cir. 1981). The Eleventh Circuit was correct in placing the burden upon Petitioner and finding that he had not shown an exception to the exhaustion requirement.

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[6] Not only did Petitioner fail to properly raise the futility argument below, he never pled futility nor did he provide appropriate evidence in support of a futility argument.

Because Petitioner has not set forth compelling reasons for the granting of his Petition, Respondent respectfully submits to the Court that it should be denied.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

AMY TOTENBERG
Counsel of Record
210 Pryor Street
Atlanta, Georgia 30335
(404)827-8959

CHARLES L. WEATHERLY
THE WEATHERLY LAW FIRM
3414 Peachtree Road, NE
Suite 450
Atlanta, Georgia 30326
(404)262-9500